demands that the FCC provide at least some support for its predictive conclusions that rural telephone companies will have an anticompetitive effect on the in-region delivery of LMDS. *See Century Communications*, 835 F.2d at 300-02. Unfortunately, the *Order* bases its adoption of the eligibility restriction on economic theory without supporting data for rural markets.

Ironically, the FCC relies on *Cincinnati Bell* to justify the "predictive judgments" on which it bases its unsupported conclusion that the eligibility restriction comports with the intent of Sections 309(j)(3) and (4). *Order* ¶ 161. However, the court in *Cincinnati Bell* found the FCC's imposition of eligibility restrictions to be arbitrary and capricious. Accordingly, the FCC's reliance on *Cincinnati Bell* is misplaced.

Cincinnati Bell was a consolidated proceeding in which the petitioners challenged various aspects of the FCC's rulings with respect to ownership limitations in the wireless communications industry. The FCC had adopted rules that allowed cellular providers to obtain licenses for personal communications service ("PCS") systems, but only outside of their current cellular service areas. *Cincinnati Bell*, 69 F.3d at 757. Where a cellular provider's existing service territory overlapped the population of a new PCS geographic area by ten percent or more, the cellular provider was restricted to acquiring no more than one of the ten megahertz spectrum blocks in that geographic area. *Id.* The FCC also adopted a 20 percent ownership "attribution" rule for determining whether to attribute an ownership interest in a cellular licensee to a PCS applicant, thereby restricting that entity's ability to own PCS spectrum. *Id.* at 758.

In *Cincinnati Bell*, the court found that the language of Section 309(j) clearly evinces Congress's intention that the FCC auctions licenses in a manner that promotes economic opportunity and competition, while avoiding an excessive concentration of licenses. *Cincinnati*

Bell, 69 F.3d at 761. While the court concluded that the Act gives the FCC authority to "establish at least some eligibility criteria to promote competition and avoid undue concentration of licenses," the court found the FCC's decision making to be arbitrary. *Id.* at 762. The court also found that Section 309(j) illustrated "Congress's particular concern that [small businesses, rural telephone companies and minority owned businesses] participate in the auctions." *Id.*

The court also found that the 20 percent ownership attribution standard bore no relationship to the ability of a PCS licensee to engage in anticompetitive behavior. *Id.* at 759. The court found that the attribution rule was an absolute ban on participation in the PCS industry, regardless of whether a party had actual control over a cellular licensee. *Id.* at 760. The court concluded that the FCC's "predictive judgment" as to the possible future behavior of future marketplace entrants is highly suspect, makes little common sense, and the FCC provides to this Court nothing, no statistical data or even a general economic theory to support its argument." *Id.*

As in *Cincinnati Bell*, the FCC's conclusion here that the application of eligibility restrictions best comports with the goals of Section 309(j) is speculative, lacks a basis in the record, and is plainly contrary to law and to the FCC's stated objectives. As noted above, the in-region eligibility restriction does not meet the FCC's stated objective of providing economic opportunity to rural telephone companies, nor does it award licenses to rural telephone companies, one of the enumerated class of applicants among whom the FCC is to disseminate licenses. In the instance case, as in *Cincinnati Bell*, "[I]f the FCC were truly concerned about diversifying ownership, the current rules are a curious way of going about it." *Cincinnati Bell*, 69 F.3d at 764. In each case, the eligibility restriction allows communications giants to bid nationwide while preventing rural telephone companies from bidding "in the one geographic

service area in which they might be able to provide service, namely the area in which they already provide...service." *Id.*

2. The FCC Failed to Consider Record Evidence

In imposing the in-region eligibility restriction on rural telephone companies, the FCC failed to consider "relevant factors" and record evidence. *See Overton Park*, 401 U.S. at 416. The record includes evidence of the detriment that the eligibility restriction would cause to rural telephone company participation in LMDS and deployment of LMDS to rural areas. *See, e.g.*, Ad Hoc RTG Comments at 4-6 Ad Hoc; RTG Reply at 1-2; NTCA Comments at 2-4; IA Reply at 3-5; Comments of the Organization for the Advancement and Promotion of Small Telephone Companies ("OPASTCO") at 4-6.

The *Order* failed to address evidence that the eligibility restriction would harm the ability of rural telephone companies to provide LMDS in their service areas, and instead addressed only the aspects of the comments dealing with the impact of the eligibility restriction on the deployment of service to rural areas. In doing so, the FCC concluded, "[r]ural LECs have not made the case that they are the only entities that can provide LMDS in their service territories." *Order* ¶ 179. Under the FCC's logic, in order for a rural telephone company to be entitled to an opportunity to participate in a new service, the rural telephone company must first demonstrate that it is the *only* entity that can provide the service. Section 309(j), however, requires no such demonstration. The FCC's suggestion to the contrary is ludicrous and entirely without foundation. The FCC's failure to consider the evidence of harm to rural telephone company participation can not be excused under the guise of seeking to prevent anticompetitive behavior.

3. The FCC's Conclusion That The Eligibility Restriction Will Not Compromise Rural Telephone Company Participation in LMDS Is Arbitrary and Capricious

Instead of adopting provisions for the *benefit* of rural telephone companies as required by Section 309(j), the *Order prohibited* rural telephone companies from holding in-region LMDS licenses. Despite this in-region prohibition, and the complete lack of provisions for rural telephone companies, *see Order* ¶ 362, the FCC concluded that its eligibility restriction will not hinder rural telephone company participation in the provision of LMDS and that "the interests of rural telephone companies are adequately addressed" by its LMDS rules. *Id.*

The FCC concluded that the restriction will not hinder rural telephone company participation because rural telephone companies: (1) are small and are unlikely to trigger the restriction; (2) may acquire an LMDS license through partitioning; (3) may acquire and divest any overlapping area; and, (4) may acquire a 150 megahertz license. These reasons either fail to justify the FCC's conclusion or themselves lack a reasoned basis in the record.

a. The FCC's Conclusion that Rural Telephone Companies Will Not Trigger the Eligibility Restriction Is Arbitrary and Capricious

The FCC attempts to minimize the impact of the eligibility restriction on rural telephone companies by stating that "because rural LECs are generally small, they are unlikely to have the degree of overlap with [Basic Trading Areas ("BTAs")] necessary . . . to trigger our eligibility restriction." *Order* ¶ 180; *see also id.* at n. 302. This conclusion is speculative, unsupported by the record and contrary to the facts. The FCC's LMDS eligibility restriction places a three year restriction on a rural telephone company's eligibility to own an attributable interest in the A

Block LMDS license if the LMDS license area "significantly overlaps" the rural telephone company's telephone service area. *Id.* ¶160.[7] Accordingly, it is not the size of a rural telephone company which triggers the in-region restriction, but rather the relative overlap of an LMDS license area and rural telephone company's wireline service area. *Order* ¶ 188. The *Order* prohibits even the smallest rural telephone company from holding an LMDS license as long as the population of the telephone service area overlapping the LMDS license area is ten percent or more of the population of the overlapped LMDS license area. Even though the BTAs upon which the FCC will license LMDS do not mirror the boundaries of rural telephone companies' service areas, a rural telephone company's service area can easily overlap 10 percent or more of the BTA's population.

In addition, as discussed in Section II.A.3.c, *infra*, the eligibility restriction becomes even more prohibitive in the context of partitioning. As licensees geographically partition portions of their BTAs, and the partitioned LMDS license area becomes smaller, the likelihood that a rural telephone company will trigger the eligibility restriction becomes greater.

There is simply no basis in the record for concluding that rural telephone companies are "unlikely" to trigger the eligibility restriction. In addition, the FCC utterly failed to conduct an analysis of the actual degree of overlap between LMDS license areas and rural telephone company service areas and accordingly its "prediction" that rural telephone companies will not trigger the eligibility restriction cannot be sustained under *Cincinnati Bell*.

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[7] An overlap is "significant" if the ILEC's telephone service area overlaps ten percent of more of the population of the LMDS license area. *Id.* ¶188.

b. The Divestiture Provision Does Not Reduce the Adverse Impact on Rural Telephone Companies

Pursuant to the *Order*, a rural telephone company may participate in the LMDS auction and subsequently come into compliance with the FCC's eligibility restriction by divesting significantly overlapping areas or interests within 90 days. *Order* ¶ 194. The FCC concludes that the ability to divest overlapping interests in a BTA "should further ameliorate any potential negative impact on [rural telephone companies.]" *Order* ¶ 194 n. 302. Once again, there is no basis in the record or in economic theory to justify the FCC's conclusion. To the contrary, the divestiture provision is singularly unhelpful to rural telephone companies because the areas rural telephone companies have a desire and ability to serve are those within and adjacent to their service area. Accordingly, the divestiture provision will have the intrinsic effect of requiring rural telephone companies to divest that which it is most economically viable for them to serve (*i.e.*, the very rural areas that they are committed to serve and that Congress is most concerned about). As the court noted in *Cincinnati Bell*, such a provision will prohibit rural telephone companies from operating in the one area in which it might be economically viable to provide service, their wireline service area. *See Cincinnati Bell*, 69 F.3d at 764.

c. The FCC's Conclusion That Geographic Partitioning Will Ensure The Dissemination of Licenses to Rural Telephone Companies Is Arbitrary and Capricious.

In declining to adopt special provisions to benefit rural telephone companies, as required by Section 309(j), and in attempting to lessen the negative impact of the in-region eligibility restriction, the FCC relies on geographic partitioning as the method by which rural telephone

companies can acquire LMDS spectrum. *Order* ¶¶ 180, 362. The FCC argues that rural telephone companies that are unsuccessful in the LMDS auction:

> will still have the opportunity to participate — **subject to the eligibility rules** — by either acquiring spectrum from an LMDS licensee through the partitioning and disaggregation[8] rules we are adopting, or by contracting (in a way that does not circumvent any applicable ownership and control requirements and does not raise competitive concerns) with the LMDS licensee to provide service in its telephone market area.

Id. ¶ 180 (footnote omitted) (emphasis added). The FCC's conclusion is contrary to the facts and unsupported by the record. The significant overlap criteria effectively render the FCC's partitioning rules useless for rural telephone companies. Regardless of how small the rural telephone company may be, its telephone service area will almost always exceed ten percent of any partitioned LMDS service area. In order to comply with the eligibility restriction, a rural telephone company would be required to partition a geographic area many times larger than the rural telephone company requires. This result is antithetical to the Act and the FCC's stated goals of encouraging efficient use of spectrum, 47 U.S.C. § 309(j)(3)(D), and leaving the determination of "the correct size of the licenses to the licensees and the marketplace." *Id.* ¶ 145.

More importantly, the FCC's prediction that partitioning will provide rural telephone companies an opportunity to participate in the provision of LMDS is not supported by the record or by the FCC's experience. Partitioning does not provide rural telephone companies with a meaningful opportunity to participate in spectrum-based services such as LMDS and does not satisfy the mandate of Section 309(j) of the Act. The FCC's own records reflect that licensees

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[8] Spectrum disaggregation permits a licensee to assign a portion of the spectrum to another entity. However, the FCC prohibits rural telephone companies from holding any portion of the Block A license in-region. *Id.* ¶ 160.

are reluctant to enter into partitioning agreements with small and/or rural entities. To date, only six partitioning deals have been consummated in auction-licensed services.[9] Large licensees have stated that they find the prospect of partitioning small geographic areas unappealing. GTE stated that although it has been approached by rural telephone companies proposing deals for areas as small as a school district, it has declined to enter partitioning arrangements for rural areas because "[i]t costs just as much to negotiate a small contract as a large one . . . making them less attractive." *Subdividing Licenses Holds Promise for Small Carriers But Some Large Companies Aren't Looking to Do Small Deals*, Land Mobile Radio News, Vol. 51, No. 18 (May 2, 1997). As this article noted,

> [i]t is uneconomical to provide service to a small rural market based on a license valuation arrived at by a major carrier with a regional or nationwide business model that calls for revenues in the billion dollar range. If it did make sense, the major carrier presumably would provide service to the area itself. Pricing a small area at the original service area's per pop figure seldom produces a price that makes sense to small carriers.

Id. Accordingly, the general undesirability of partitioning eliminates partitioning as a meaningful opportunity by which rural telephone companies can avoid the negative impact of the eligibility restriction and participate in the provision of LMDS.

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[9] All of the auction-related partitioning agreements involved large Major Trading Areas ("MTAs"). None of the deals involve smaller BTA-based licenses. *See* Pub. Notice, Report No. LB-97-11 (rel. Dec. 20, 1996) (File No. 50050-CW-97) (Cincinnati-Dayton MTA); Pub. Notice, Report No. LB-97-04 (rel. Nov. 1, 1996) (File No. 50003-CW-AL-96) (Spokane-Billings MTA); Pub. Notice, Report No. LB-96-45 (rel. Sep. 6, 1996) (File No. 50030-CW-AL-96) (Minneapolis-St. Paul MTA); Pub. Notice, Report No. LB-96-38 (rel. July 19, 1996) (File No. 50001-CW-AL-96) (Richmond-Norfolk MTA); Pub. Notice, Report No. LB-96-27 (rel. May 10, 1996) (File No. 50002-CW-AL-96) (Spokane-Billings MTA); *In re* Lancaster Communications, Inc., *Order*, DA 97-1470 (rel. July 11, 1997) (File No. SOOO434).

B. The Application of the In-Region Eligibility Restriction to Rural Telephone Companies Hinders the Rapid Deployment of LMDS to Rural America and Is Arbitrary and Capricious.

Section 309(j)(3)(A) requires the FCC to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, **including those residing in rural areas**. . . ." 47 U.S.C. § 309(j)(3)(A) (emphasis added). The FCC's in-region restriction defeats that goal by preventing the very entity that is most likely to provide LMDS service (*i.e.*, rural telephone companies) from holding the license in the area in which it is most capable of providing the service and, in so doing, subverts the essence of the public policy foundation for Section 309(j)(4)(D).

The FCC ignores key evidence submitted repeatedly in the comments filed by rural telephone companies concerning the rural areas they serve. This evidence included the fact that service territories of rural telephone companies are generally insular areas of low population density that are unattractive to new market entrants. Ad Hoc RTG Comments at 5; NTCA Comments at 2; OPASTCO Reply at 5. It also included evidence that the cost of building telecommunications infrastructure in vast, often harsh and rugged, terrain to serve a small number of subscribers is prohibitive for many entrepreneurs, and economically disagreeable for large service providers, and is the reason why rural telephone companies rely on universal service support mechanisms in order to serve these high cost areas. Ad Hoc RTG Comments at 5. The FCC further failed to recognize that Congress has repeatedly adopted special provisions, exceptions and exemptions for rural telephone companies so that a variety of communications services could be delivered to rural America *by rural telephone companies*. For example, the FCC failed to consider that in the past, rural telephone companies were permitted to provide

cable service to their telephone service areas pursuant to an exemption from the telco-cable cross ownership rule,[10] and that currently rural telephone companies receive an exemption from the interconnection requirements of 47 U.S.C. § 251(c) which require incumbent LECs to allow competitors, *inter alia*, unbundled access to their telephone networks. *See generally*, 47 U.S.C. § 251(f). These exemptions were given to rural telephone companies in recognition of the fact that they historically have been the only entities who seek to provide telecommunications services in their rural telephone service areas. Rather than recognize this body of evidence, the FCC summarily dismissed it stating that:

> Rural LECs have not made the case that they are the only entities that can provide LMDS in their service territories.

Order ¶ 179. As discussed *supra* in Section II.A.2, Section 309(j) contains no such requirement that rural telephone companies demonstrate that they are the only entities that can provide LMDS to rural areas. The FCC's decision to ignore the body of evidence to the contrary demonstrates that the FCC failed to articulate a rational connection between the facts in the record and the decision it made, thereby resulting in a decision that is arbitrary, capricious and contrary to law. *See City of Brookings*, 822 F.2d at 1165.

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[10] See 47 C.F.R. § 63.58 (1995). This rule was deleted after passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *to be codified at* 47 U.S.C. §§ 151 *et seq.* ("TCA 96").

1. There is No Evidence to Support the FCC's Conclusion That Competitive Forces Will Ensure the Provision of LMDS To Rural America.

The FCC bases its conclusion that the LMDS eligibility restrictions will not hinder the delivery of LMDS to rural areas on the premise that if rural markets prove to be profitable for the provision of LMDS, non-rural telephone companies will enter the market to serve the rural population. *Order* ¶ 180. Not only is this justification inconsistent with the premise underlying the explicit recognition of rural telephone companies in Sections 309(j) (3) and (4), it is not drawn as a rational conclusion from the record or grounded in basic common sense.

The FCC chose to ignore the record and instead rely on its prediction that marketplace forces would ensure the rapid provision of service to rural areas. The FCC states:

> [W]e do not believe that these [eligibility] restrictions, as crafted, will hinder the introduction of LMDS in rural areas . . . Therefore, if it is profitable to provide service to rural areas, a licensee should be willing to do so, either directly or by partitioning the license and allowing another firm to provide service.

Order ¶¶ 179-80. That the FCC should attempt to fulfill its Section 309(j)(3)(A) obligations by relying on the vagaries of the marketplace is outrageous, particularly when such marketplace is artificially restricted in scope to exclude in-region rural telephone companies. Not only has the FCC abandoned its duty to ensure that rural areas receive timely LMDS at reasonable prices by failing to craft policies beneficial to rural telephone companies, it has directly impaired the rapid delivery of LMDS service to rural America through its reliance on marketplace forces to serve rural America. Past history and the record clearly indicate that marketplace forces will not ensure the rapid deployment of LMDS service to rural America in the absence of markets which are desirable and profitable. Most rural areas are *not* desirable or profitable to serve. The

undesirability of serving rural markets is evidenced by the decisions of the RBOCs and other large LECs not to provide wireline or wireless services to these areas. It is also the very reason why Congress had to specifically direct the FCC to promote the development and rapid deployment of new technologies, products, and services **for the benefit of the public, including those residing in rural areas**. 47 U.S.C. § 309(j)(3)(A). Moreover, as discussed *infra*, if the FCC's assumption about the operation of marketplace forces were true, there would be no need to establish universal service support to serve high cost rural areas, and Congress would not have had to write language into the statute to specifically direct the FCC to disseminate licenses to rural telephone companies. *See* 47 U.S.C. § 309(j)(3)(B). The FCC's failure to show how its predicted marketplace forces will operate in rural America is arbitrary and capricious rulemaking and cannot be upheld. *See Century Communications Corp.*, 835 F.2d 292, 300-02.

2. There is No Evidence to Support the FCC's Conclusion That an Eligibility Restriction is Necessary in Rural Areas to Prevent Anticompetitive Behavior

The FCC has utterly failed to demonstrate how the anticompetitive behavior it seeks to prevent through its eligibility restriction is prevalent in rural areas. To the contrary, the FCC's entire discussion of market power, the basis for implementing the eligibility restriction, is devoid of any reference to past or present conditions in rural areas that would warrant the imposition of the restriction. *See Order* ¶¶ 162-81.

The FCC's in-region restriction was purportedly designed to prevent anticompetitive behavior that could arise if an LMDS license fell into the hands of an ILEC, with its allegedly inherent market power. *Order* ¶¶ 163-75. Yet, the FCC provides no reasoned explanation for

how this concern applies to rural areas. Moreover, as discussed above, it ignores record evidence that competition in rural areas will be stifled if rural telephone companies are prohibited from providing in-region LMDS. Accordingly, the FCC has failed to articulate a rational connection between the facts found and the choice made, and its decision is therefore arbitrary and capricious. *See City of Brookings,* 822 F.2d at 1165.

3. The FCC Gave No Consideration to the Universal Service Principles Set Forth in Sections 309(j)(3)(A) and 254(b)(3) When It Imposed the Eligibility Restriction on Rural Telephone Companies

The LMDS eligibility restriction not only violates Section 309(j)(3)(A), it flies in the face of the principle of universal service embodied in the Act. In both Section 309(j) and Section 254(b)(3), Congress recognized the need to ensure parity between urban and rural areas. 47 U.S.C. § 309(j); 47 U.S.C. § 254(b)(3).

> Consumers in all regions of the Nation, including low-income consumers **and those in rural, insular, and high cost areas**, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

47 U.S.C. § 254(b)(3). The *Order's* treatment of universal service principles as they relate to service in rural areas is confined to a footnote, in which the FCC nebulously states: "the broad universal service policies of the Telecommunications Act of 1996 will contribute substantially to addressing this objective." *Order* ¶ 271 n. 403. Given that the effect of the eligibility restriction

is to preclude rural telephone companies from providing LMDS to rural areas, as discussed below, implementation of the policies and goals of universal service with respect to LMDS will be impossible.

An A Block LMDS license can be used to provide voice, data, two-way video, teleconferencing, telemedicine, telecommuting, global networks, broadband video-on-demand and distance learning. *In re* Rulemaking to Amend Parts 1, 2, 21, and 25 of the FCC's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCCR 19005 (1996) ¶ 15. Thus, this license accommodates the extant universal service obligations of providing voice grade access to the public switched network, *In re* Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, FCC 97-157, 62 Fed. Reg. 32862 (June 17, 1997) ¶ 56 ("*Universal Service Order*"), as well as the higher bandwidth services required for eligible schools, libraries and rural health care providers. *Id.* ¶ 64. LMDS also provides a platform for the provision of the advanced telecommunications services Congress was contemplating in defining universal service as "an evolving level of telecommunications services that the FCC shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c)(1). In rural areas, where rural telephone companies are effectively prohibited from providing in-region LMDS, current and future universal service obligations will go unmet, in contravention of Section 254 of the Act. Without the participation of incumbent rural telephone companies who have a desire to serve their communities and existing infrastructure to accomplish the provision

of LMDS service, rural health care providers and schools and libraries will be deprived of access to the higher bandwidth services that Congress and the FCC determined to be necessary. *See, e.g., Universal Service Order* ¶¶ 620-621.

If rural telephone companies are restricted from acquiring an in-region LMDS license, rural America will go without the types of advanced services that will be available to their urban counterparts. This disparate treatment of rural and urban areas violates the directive of Section 254(b)(3) that rural areas have access to telecommunications services "reasonably comparable to those services provided in urban areas." 47 U.S.C. § 254(b)(3). In enacting TCA 96, Congress was fully aware that in remote rural areas, the incumbent rural telephone company would remain the only "eligible telecommunications carrier" entitled to receive universal service support pursuant to Section 214(e) of the Communications Act. 47 U.S.C. § 214(e). By effectively excluding rural telephone companies from the provision of LMDS, the FCC's eligibility restrictions effectively limit universal service support for LMDS, and accordingly reduce the likelihood that rural America will have access to such services. The FCC's failure to consider the relevant factors caused it to make a clear error in judgment which resulted in a decision that cannot be upheld. *See Overton Park*, 401 U.S. at 416. Accordingly, the FCC's reliance on universal service policies to ensure the provision of LMDS to rural areas is unsupported by the facts and is therefore arbitrary and capricious.

4. The FCC's Performance Requirements When Coupled With The Eligibility Restriction Ensure That Rural America Will Not Receive LMDS in Direct Violation of Section 309(j)(4)(B)

As discussed above, the FCC's application of the eligibility restriction to rural telephone companies by itself ensures that LMDS will *not* be rapidly deployed to rural areas. To add insult to injury, the FCC further thwarted rapid delivery of LMDS to rural areas by adopting lax performance requirements in direct contravention of Section 309(j)(4)(B) which states:

> (4) In prescribing regulations pursuant to paragraph (3), the FCC shall--
>
> * * *
>
> (B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to **ensure prompt delivery of service to rural areas**, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.

47 U.S.C. § 309(j)(4)(B) (emphasis added).

Instead of adopting performance requirements that would ensure the rapid deployment of LMDS to rural areas as required by Sections 309(j)(3)(A) and (4), the FCC adopted "flexible build-out requirements for LMDS," requiring that licensees provide "substantial service"[11] to their service area within ten years. Order ¶ 266. The FCC explained that a licensee would meet this standard if it provided service to 20 percent of the population in the BTA within ten years. Order ¶ 270. The FCC asserts that "minimum construction requirements can promote efficient use of the spectrum, encourage the provision of service to rural, remote, and insular areas, and prevent warehousing of spectrum." Order ¶ 266. The FCC bases this conclusion on its

[11] The FCC circularly defined "substantial service" as "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal." *Id.* ¶ 269 (footnote omitted).

erroneous "beliefs" that (1) an auction winner has shown by its willingness to pay market value that it will put the license to its best use; (2) service to rural areas will be promoted by partitioning and disaggregation of LMDS spectrum; (3) universal service policies will ensure service to rural areas. *Order* ¶ 271. Sections 309(j)(3) and (4) plainly recognize that the amount an entity is willing to pay for spectrum cannot be the sole factor in determining that spectrum's best use. The public policy considerations delineated throughout Section 309(j) must be considered. The FCC's abdication of its responsibility under Section 309(j) to the marketplace and its unsupported corollary beliefs that rural areas will be served by partitioning is not supported by Sections 309(j)(3) and (4) or the record. Additionally, as discussed in Section II.B.3, *supra*, reliance on universal service objectives does not excuse the lack of meaningful performance requirements. Accordingly, with respect to the provision of service to rural areas, the Commission's "beliefs" are "highly suspect, make[] little common sense" and are unsupported by general economic theory. *See Cincinnati Bell*, 69 F.3d at 760.[12]

Contrary to the FCC's "beliefs," the lax performance requirements when coupled with the rural telephone company eligibility restriction hinder the delivery of LMDS to rural areas by foreclosing rural telephone companies from speeding LMDS to their rural areas. Pursuant to the required ten year "substantial service" showing, LMDS licensees have no incentive to rapidly deploy LMDS to rural areas. Licensees will be able to meet the 20-percent-population coverage benchmark by serving urban areas and avoiding construction in rural areas, thereby effectively

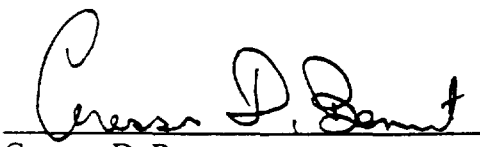
[12] In adopting its performance requirements, the FCC also ignored the record which presented specific proposed performance requirements for the FCC's consideration. For example, the FCC failed to address IA's proposal that the FCC adopt a "fill-in" policy similar to that adopted for the cellular service, *see* 47 C.F.R. § 22.949(b), whereby licensees must use or lose their spectrum within a certain time period. IA Reply at 8.

warehousing the spectrum in rural areas in direct violation of Section 309(j)(4)(B). Once the population benchmark is met, such licensees will lack any incentive to negotiate partitioning agreements with those seeking to serve rural areas. Because the FCC's lack of performance requirements, when coupled with the eligibility restriction, further thwart the Congressional mandate set forth in Section 309(j)(3)(A), the eligibility restriction must be struck down as arbitrary and capricious with respect to rural telephone companies. *See Chevron*, 467 U.S. at 842-3.

CONCLUSION

In view of the foregoing, Intervenors respectfully request that this Court vacate the *Order* and remand the case to the FCC with instructions to remove the restriction as it applies to rural telephone companies.

Respectfully submitted,



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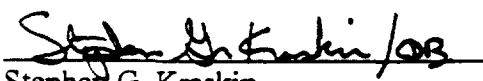

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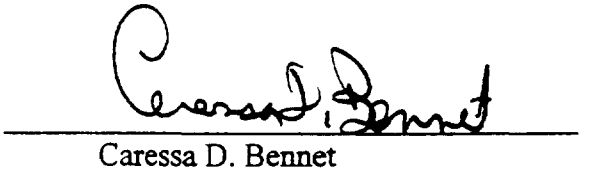
Dated: August 6, 1997

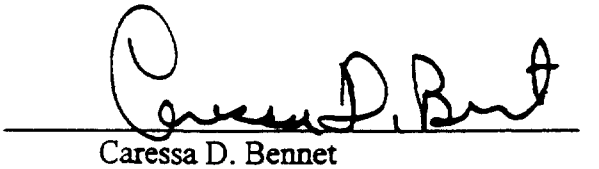
CERTIFICATE OF SERVICE

I, Caressa D. Bennet, hereby certify that I have this 6th day of August 1997, caused copies of the **JOINT BRIEF OF INTERVENORS RURAL TELECOMMUNICATIONS GROUP and INDEPENDENT ALLIANCE IN SUPPORT OF PETITIONER NATIONAL TELEPHONE COOPERATIVE ASSOCIATION** to be served upon the parties on the attached service list, via first class, U.S. postage pre-paid mail.



Caressa D. Bennet

I, Caressa D. Bennet, hereby certify that this Brief does not exceed the 8750 word limit set by order of the Court dated July 25, 1997.



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STATUTORY ADDENDUM

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the inspection and examination of the public. The Commission, in making any such valuation, shall be free to adopt any method of valuation which shall be lawful.

(g) Nothing in this section shall impair or diminish the powers of any State commission.

SEC. 214. [47 U.S.C. 214] EXTENSION OF LINES.

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 of this Act: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduc-

tion, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall forfeit to the United States $1,200 for each day during which such refusal or neglect continues.

(e) PROVISION OF UNIVERSAL SERVICE.—

(1) ELIGIBLE TELECOMMUNICATIONS CARRIERS.—A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received—

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS.—A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the